

DEC 18 1976

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-387

JOHN PRESTON ROSENBARGER, JR. - Petitioner*versus*

UNITED STATES OF AMERICA - - Respondent

On Petition For a Writ of Certiorari to the United States Court
of Appeals For the Sixth Circuit

**REPLY TO THE MEMORANDUM FOR THE
UNITED STATES IN OPPOSITION**

JOSEPH G. GLASS118 South Fifth Street
Louisville, Kentucky 40202*Counsel for Petitioner*

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-387

JOHN PRESTON ROSENBERGER, JR. - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

**REPLY TO THE MEMORANDUM FOR THE
UNITED STATES IN OPPOSITION**

Comes the petitioner, and for his reply to the memorandum in opposition filed by the Solicitor General on behalf of the United States concerning the timeliness of the filing of the Petition for Writ of Certiorari prays that the Court be advised as follows:

1. That it is uncontested that the Judgment of the United States Court of Appeals for the Sixth Circuit for the matter herein was entered herein on June 23, 1976.

2. That the United States Court of Appeals for the Sixth Circuit, on motion of the petitioner, and without opposition of the United States Attorney, on July 19, 1976 stayed its mandate for thirty (30) days from that date pending application to this Court for Writ of Certiorari (App. B, 1).

3. That on August 16, 1976, the petitioner filed a motion for extension of time for stay of the Mandate to and including September 18, 1976, which motion was received and not objected to by the Hon. James H. Barr, Assistant United States Attorney, as is evidenced by his signature affixed thereto (App. B, 2 & 3).

4. That on August 19, 1976, the United States Court of Appeals for the Sixth Circuit, the Hon. Paul C. Weick, Circuit Judge, entered an order granting the petitioner's motion for an extension of the mandate to and including September 18, 1976 (App. B, 4).

Counsel for the petitioner respectfully advises the Court that he was not aware of the thirty (30) day requirement contained in Supreme Court Rule 22(2). While counsel has been involved in other litigation presented to this Honorable Court, that litigation, with one exception, arose from decisions of State Courts, which allows the filing within ninety (90) days of Judgment. The remaining exception mentioned was counsel's representation of Carl J. Wedding, in *Wingo v. Wedding*, 418 U. S. 461, 94 S. Ct. 2842, 41 L. Ed. 2d 879 (1974). In that case the State applied for and was granted a total of ninety (90) days within which to petition for certiorari to this Court. Counsel now

realizes that since the Wedding case involved a writ of habeas corpus that it was technically classified a civil matter. However, on the point of timeliness, Stern & Gressman¹ in their treatise concerning practice before this Court, recited that so called out of time filings were not fatal, and moreover, were subject to the consideration of the Court, citing *Hicks v. District of Columbia*, 383 U. S. 252, 253; *Heflin v. United States*, 538 U. S. 415-418; *Smith v. Mississippi*, 373 U. S. 238; *Arnold v. North Carolina*, 376 U. S. 773; *Robison v. United States*, 390 U. S. 198; *Nelson v. United States*, 392 U. S. 303 and others. A review of these cases and others does not indicate that this Court has altered its position concerning consideration of so called out of time filings.

WHEREFORE, the petitioner, John Preston Rosenbarger, Jr., through his counsel, prays that this Court will allow the petition herein to be considered on its merits and not rejected as being filed out of time.

Respectfully submitted,

JOSEPH G. GLASS
118 South Fifth Street
Louisville, Kentucky 40202
Counsel for Petitioner

¹Stern, Robert L. and Gressman, Eugene. *Supreme Court Practice*. Fourth Edition. Washington, D.C.: The Bureau of National Affairs, Inc. (1969), pp. 242-245.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW YORK

Before the Court are the following appeals:

1. *United States v. [Name]*, No. [Number]

2. *United States v. [Name]*, No. [Number]

ORDER

APPENDIX B

The following documents are submitted in support of the appeal of [Name] and are hereby received by the Court. The documents are: [List of documents]

Submitted by [Name]

[Signature]

Attorney

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 75-1821

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JOHN PRESTON ROSENBERGER, JR. - *Defendant-Appellant*

BEFORE: WEICK, CELEBREZZE and LIVELY, Circuit Judges.

ORDER STAYING MANDATE—Filed July 19, 1976

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman

Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT
AT CINCINNATI

File No. 75-1821

JOHN PRESTON ROSENBERGER, JR. - *Petitioner-Appellant*

v.

UNITED STATES OF AMERICA - - *Respondent-Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

MOTION FOR EXTENSION OF TIME FOR STAY OF MANDATE

Petitioner-Appellant, by counsel, respectfully moves this Court to extend the time to September 18, 1976 for staying the issuance of the mandate in this matter, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, until final disposition of the matter, as it is still the intention of the petitioner-appellant to make proper and timely application to the Supreme Court of the United States for Writ of Certiorari to review the decision of this Court in the above styled action. Counsel for the petitioner-appellant has been unable to prepare his Petition for Writ of Certiorari in the thirty (30) day period in which this Court has issued its original stay of the mandate.

Respectfully submitted,

(s) Joseph G. Glass

118 South Fifth Street

Louisville, Kentucky 40202

584-7288

Counsel for Petitioner-Appellant

NOTICE

Please take notice that the foregoing Motion will be filed with the Clerk of the United States Court of Appeals for the Sixth Circuit by mailing a copy thereof on this 16th day of August, 1976, to be considered at the convenience of the Court.

(s) Joseph G. Glass

Have seen, do not object:

Copy received.

(s) James H. Barr

Assistant United States Attorney

Federal Courthouse

Louisville, Kentucky 40201

Counsel for Respondent-Appellee

UNITED STATES COURT OF APPEALS

**FOR THE SIXTH CIRCUIT
AT CINCINNATI**

File No. 75-1821

JOHN PRESTON ROSENBERGER, JR. - *Petitioner-Appellant*

v.

UNITED STATES OF AMERICA - - *Respondent-Appellee*

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE**

**MOTION FOR EXTENSION OF TIME FOR STAY
OF MANDATE—Filed August 17, 1976**

Petitioner-Appellant, by counsel, respectfully moves this Court to extend the time to September 18, 1976 for staying the issuance of the mandate in this matter, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, until final disposition of the matter, as it is still the intention of the petitioner-appellant to make proper and timely application to the Supreme Court of the United States for Writ of Certiorari to review the decision of this Court in the above styled action. Counsel for the petitioner-appellant has been unable to prepare his Petition for Writ of Certiorari in the thirty (30) day period in which this Court has issued its original stay of the mandate.

Respectfully submitted,

(s) Joseph G. Glass

118 South Fifth Street

Louisville, Kentucky 40202

584-7288

Counsel for Petitioner-Appellant

August 19, 1976—Stay of mandate shall continue pending timely application to Supreme Court for writ of certiorari and then until final disposition of the application. Weick, J. (Handwritten on original copy.)